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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

C. M. ROUSSEAU, JR., ET AL,
Petitioners,

V.

TELEDYNE MOVIBLE OFFSHORE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does an employer, by exacting an implied "agreement" with its employees to its practice of non-payment, escape an obligation to compensate the employees for "waiting time" during which the employer requires the employees to remain on its premises under threat of termination? In the setting in which this question arises, the employer's premises are not offshore or at any other remote location, and during the waiting time the employees are not actively engaged in physical labor.

2. If the answer to the first question is "yes," then can there be a valid implied agreement when the employees' assent is nothing more than their failure to quit after complaining to the employer of its unilateral changes in the number of compensable hours in the regular

workweek and other circumstances of employment?

3. Does an employer, in the circumstances described in question no. 1 above, escape the obligation to pay the employees for waiting time by offering them limited recreational activities when the employees have clearly expressed a preference to leave the premises? Can the employer escape such obligation by claiming that unpaid and forced waiting time might assist the employer in securing business which might result in work for the employees for which they would get paid?

LIST OF PARTIES

Petitioners are the following sixty-three (63) individuals: Cornelious Aucoin, George W. Bassett, Clifford S. Beard, Harry Bellard, Mark S. Blackledge, Kenneth Breaux, Gary Brown, Tommy L. Brown, Earl Brunet, James D. Butler, William E. Chandler, Keevin Comeaux, Paul Daigle, Donald M. Daigrepont, Leland H. Davis, John Perry Deville, John D. Dixon, Sr., Winston R. Douget, Jimmy R. Edison, Travis J. Frederick, Ned Gauthier, Layman E. Gilmore, Joseph Guillory, Adam J. Guidry, Sr., Joe F. Hall, Bruce A. Hebert, Michael S. Hebert, Paul Hitt, Jr., Junius Hoffpauir, David D. Holmes, Leroy Holmes, Richard D. Holmes, Dixie Hughes, Donald E. Hugonin, James D. Jones, Lloyd A. Jones, Louis M. Kern, Seaborn L. Lott, Ronnie J. McCormick, Barney L. McCurley, Virginia McCurley, Gilbert Mouton, Earl P. Neil,

Sr., John Wesley Phillips, Purvis J. Picard, Wayne A. Pitalo, Harry J. Poirrier, C. M. Rousseau, Jr., Donald E. Sanders, Clifford D. Scott, Harry J. Smart, Stifford Sonnier, Gary J. Stelly, George W. Stelly, Jimmy Strickland, Joyce Ray Stringer, Wendell Sullivan, Jr., Edward A. Todd, Lovelace Touchet, Bobby J. Williber, Artis Ray Windham, Johnnie R. Windham.

Respondent is Teledyne Movible Offshore, Inc.

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REFERENCE TO REPORTS OF OPINIONS OF COURTS BELOW

The original opinion of the Court of Appeals for the Fifth Circuit is reported at 805 F.2d 1245 (5th Cir. 1986) and is reprinted in the appendix separately accompanying this petition for writ of certiorari at page 1.

The opinion of the Court of Appeals for the Fifth Circuit denying rehearing is reported at 812 F.2d 971 (5th Cir. 1987), and is reprinted in the appendix at page 16.

The original opinion of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, is reported at 619 F.Supp. 1513 (W.D. La. 1985), and is reprinted in the appendix at page 20.

The ruling of the United States District Court for the Western District of

Louisiana denying a new trial is reprinted in the appendix at page 77.

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals, Fifth Circuit, dated December 16, 1986, entered on the same date.

Petitioners' motion for rehearing was denied by the same court on March 16, 1987.

The statutory provision conferring jurisdiction on this court by writ of certiorari is 28 U.S.C. 1254(1).

APPLICABLE STATUTES AND REGULATIONS

Fair Labor Standards Act

The applicable portion of the Fair Labor Standards Act of 1938, as amended (FLSA) is found in 29 U.S.C. 207(a)(1), which provides that no employer

> "shall employ any of his employees . . . for a work week longer than forty hours unless such employee receives compensation for his employment in excess of [forty] hours at a rate not less than time and one-half times the regular rate at which he is employed."

Code of Federal Regulations--Interpretive Guidelines By Administrator Of Wage and Hour Division Of Department of Labor

The guidelines relating to waiting time are found at 29 C.F.R. 785.14, et seq., and are reproduced in the Appendix, with the more relevant ones marked for convenient reference.

STATEMENT OF THE CASE

Course of Relevant Proceedings And Disposition in the Courts Below

The original petitioners filed their complaint on October 17, 1983, in the United States District Court for the Western District of Louisiana seeking payment under the FLSA for certain times that they were required by their employer to be physically present on the employer's premises (less the time they spent eating, sleeping, and in personal pursuits) (the "hours employed" claim).

After the employer later discharged most of petitioners, they further amended their suit to allege that the discharges were motivated by their original claims in violation of the anti-retaliation provisions of the FLSA, 29 U.S.C. 215(a)(3) (the "retaliation" claim).

Jurisdiction for both the hours worked and the retaliation claim in the

district court was authorized by 28 U.S.C. 1331 and 29 U.S.C. 216(b).

A trial on the issue of liability only was held on the hours employed claim without a jury, with the court finding in favor of the employer. A trial on the issue of liability only was held on the retaliation claim before a jury, with a verdict rendered in favor of the petitioner-employees. However, the court granted the employer's motion for judgment n.o.v. and for a conditional new trial.

On December 16, 1986, the United States Court of Appeals, Fifth Circuit, affirmed the dismissal of petitioners' hours worked claims. It reversed the district court's grant of the judgment n.o.v., but affirmed its grant of the new trial on the retaliation claim. On March 16, 1987, the court of appeals denied petitioners' application for a rehearing.

While petitioners disagree with the court of appeals' affirming the grant of a new trial on the retaliation claim, this petition for a writ of certiorari seeks relief only as to the hours employed claim.

Statement of the Facts

The respondent employer is engaged in offshore drilling, fabrication of offshore fixed structures, and erection and maintenance of offshore fixed structures. The petitioner-employees were engaged in the latter activities, being assigned to three huge, football field-sized derrick barges which are used to lift offshore structures from cargo barges and place them in position on the Gulf of Mexico floor. They were also employed and the derrick barges are also used in connection with the maintenance and repairs to fixed offshore structures, for fighting blow-outs, for laying pipelines, and for

engaging in other similar activities concerning fixed offshore structures. The barges are not self-propelled and must be towed to locations by tugboats. The sixty-three petitioners were employed as crane operators, riggers, welders, engineers, cooks, and time clerks.

When all or most of the employees were hired the barges worked almost full time in the Gulf of Mexico. When they were hired their understanding was that they would work at least twelve scheduled hours per day on a seven day "hitch." They would then be off seven days.

Due to declining work, by the fall of 1982 the barges were spending a great portion of their time at dock at the employer's facility at Amelia, Louisiana, very near Morgan City. When the barges were dockside the employees performed maintenance on the derrick barges and on the employer's cargo barges, and a number

of them also worked with the fabrication yard employees in constructing new offshore platforms and components.

On October 1, 1982, shortly after most of the employees began spending most of their time dockside, the employer unilaterally announced that it was cutting the employees' regular daily hours from twelve to eight, except when the barges were called out on income-producing jobs and on which occasions the twelve hour schedule would apply. The effect of this change in hours on the employees' earnings was dramatic, since the greatest portion of the employees' earnings came from those hours in the work week in excess of forty which were worked at time and one-half, and the eight hour day eliminated most of these overtime hours. In fact, the reduction in hours had the effect of reducing earnings by approximately one-half.

During this same period when the barges were staying mostly dockside and when the employees' working hours were cut, the employer's no-leave rule, which was not publicized previously, "came into focus," as the employer's manager described it. Whereas, as the employer's officials conceded, a good number of the employees may not have known of the rule before (because the barges were almost always offshore and it was not practical to leave), they were now required to stay on the barges or within the fenced enclosure at Amelia during the time they were not engaged in physical work. In such situation, the barges were dockside, and but for the employer's no-leave rule they could have easily left the employer's premises to return home or pursue other matters of their own personal interest.

The employees constantly objected to the application of the no-leave rule to

the dockside situation. These complaints, however, were to no avail and the employer threatened the employees with dismissal for any violations of the rule.

The industry practice of other area derrick barge employers was to allow employees to leave their premises after physical work was performed.

The employer stipulated to the reasons for the no-leave rule. One was that the employer wanted to have a full crew already assembled on board the derrick barges in the event that it should be able to secure a job with a customer who may wish to have a barge towed to an offshore location at sudden notice. The employer also claimed it was concerned about its legal liability under the Jones Act and general maritime law for on-shore injuries. The employer further claimed that it was concerned about safety in that if employees were allowed their freedom

they may choose to drink and might report to work in an intoxicated condition. Finally, the employer claimed a humanitarian desire to avoid discharging any of these employees who might report to work under the influence of liquor.

Approximately one week after the employees filed their original suit, the employer terminated its no-leave rule.

While the no-leave rule was still in effect the employees were allowed very little freedom. They could not leave the employer's premises to go home, even though some of them lived short distances away and could return upon short notice if needed. They could not go home even for personal reasons. They could not leave to watch a movie or eat at a restaurant. They could not leave to pursue a second job. They could not leave for any purpose.

The employees could essentially do nothing except watch television and VCR movies, listen to music, read, eat, play cards and similar games, sleep, and play pingpong. The employees were not even allowed visitors.

ARGUMENT

Reasons That Writ Should Be Granted

A writ should be granted in this case because the decision of the court of appeals, if left standing, will conflict with prior decisions of this court and will abrogate the guidelines of the Administrator of the Wage & Hour Division which have been in effect well over forty years. The lower court's decision, if left standing, has the potential of causing an upheaval in what heretofore has been well-settled practices in waiting time cases, affecting hundreds of thousands and perhaps even millions of American workers. Further, because of one of the lower court's own earlier decisions, Allen v. Atlantic Richfield Co., 724 F.2d 1131 (5th Cir. 1984), and/or the court's interpretation of that decision, it appears that the instant case may not

represent an isolated decision and instead represents the beginning of a trend.

Rationale of Court of Appeals Decision

It is respectfully submitted that the lower court's decision directly conflicts with the two landmark decisions in waiting time cases, Armour & Co. v. Wantock, 323 U.S. 126 (1944) and Skidmore v. Swift, 323 U.S. 134 (1944), and, further, is inconsistent with Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 741 (1981). Still further, while the lower court did not acknowledge that it was doing so, its decision directly overrules the waiting time guidelines issued by the Administrator of the Wage & Hour Division, notwithstanding that this court has recognized the expertise of the Administrator and that "good administration of the [FLSA] and good judicial administration alike require that" court rulings be at odds with the guidelines

"only where justified by very good reasons." Skidmore, 323 U.S. at 140.

Contrary to Armour and Skidmore, the court of appeals appeared to bottom its decision upon a finding of an "agreement" between the employer and the employees, and nothing more. The court of appeals implied the agreement solely because the employees continued in their employment after the dockside practices began. There is no other evidence in the record or cited in the opinion to support a finding of an agreement. See Appendix p. 7.

The court of appeals did mention petitioners' claim that the waiting time was primarily for the benefit of the employer, and thus compensable. The court, however, rejected this claim, holding that the waiting time was primarily for the benefit of the employees, on grounds that the employees were free to engage in the limited recreational

activities provided. It also endorsed the district court's finding that it was the employees who benefited from the no-leave policy because of the view that unpaid waiting time may assist the employer in securing business which would result in paid hours to the employees. See Appendix, pp. 9-10.

Adverse Effects of
Court of Appeals' Decision

It is respectfully submitted that the court of appeals' decision and its rationale, if allowed to stand, will produce unintended and adverse effects.

First, as a procedural matter it would quite effectively nullify private enforcement of the FLSA. The court's rationale that failure to quit one's employment means that he has entered into a valid agreement legitimating the offending practice means that the employee is put into a "Catch-22" situation: He

cannot successfully sue unless he quits his job when the offending practice is put into effect. Yet, on the other hand, if he quits he (1) no longer has a job by which he can feed his family and (2) he does not have any lost wages for which he can even bring suit. Surely such a result was not intended by Congress!

Second, as a substantive matter employers will be free to change what heretofore have been settled practices in waiting time situations, potentially affecting very large numbers of U.S. employees.

Petitioners do not dispute that if employees voluntarily wait at an employer's premises in hopes of getting a day's or a few hours' work, such as in the practices in the stevedoring and certain other industries, the waiting time is not in the "employ" of the employer and therefore is not compensable. However,

prior to the instant case whenever employees have been required by the employer to remain on the employer's premises the waiting time has been held to be compensable. The court of appeals' decision promises to change such practices.

For example, hotel operators who may want to have a reserve of food, service, or maintenance employees available to meet any unknown business demand could require any number of their employees to remain on the premises for unpaid periods of short or even indefinite duration, perhaps twenty-four hours a day for a week or more, just as in the instant case. After all, it would be an easy matter to provide them with a place to sleep,[1] food, and the

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[1]Apparently there would not even be a requirement to provide sleeping facilities if the employer did not retain the employees on its premises past normal sleeping times.

limited recreational activities provided by respondent.

As another example, the court of appeals' decision could prompt hospitals to provide recreation and dormitory[2] rooms for nurses, x-ray technicians and other personnel to facilitate a requirement that they remain on the premises after their regularly scheduled shifts for extended periods. Thus the employer hospitals would have personnel readily on hand to meet any emergencies and at the same time avoid the cost of paying employees for waiting time.

The same would be true for factory owners, who may want, among other things, to have employees available if regularly scheduled workers should become ill or to have full maintenance crews available to handle any breakdowns; to 24-hour super-

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[2]See footnote 1.

markets who may want to pay for only as many clerks as are actually needed and still have additional ones in waiting whenever check-out lines get too long; to department stores who may have the same desire; to restaurant owners who may want to have additional staffing available should enough patrons show up to require it; and to a host of other employers too numerous to name here.

Lower Court Decision
Contrary to Decisions of This Court

The key word in the relevant portion of the FLSA, 29 U.S.C. 207(a)(1), quoted supra, is "employ." If an employer does not "employ" its employees in a waiting time situation, then there is no obligation to compensate the employees. Conversely, if the employees are "employed," then they are entitled to compensation.

The statute does not define "employ," so it is appropriate to resort to previous judicial interpretations and, as indicated, it is also appropriate to be guided by the administrative interpretations by the Administrator of the Wage & Hour Division.

As mentioned above, Armour and Skidmore are the leading cases in the area and involve facts very similar to those of the case reviewed here.

In Armour the court was faced with a case in which the employees, company firemen, were required to be on active duty from 8:00 A.M. to 5:00 P.M., during which time they had specific duties to perform. From 5:00 P.M. to 8:00 A.M. the employees were required to remain on the premises but were free to spend their time doing anything they desired as long as it was on the premises of the employer. The employees were provided eating, sleeping,

recreation and entertainment facilities so that they could enjoy their inactive time.

It is clear that there was a finding or an assumption that the employees had agreed to the employer's practice of providing no pay for the required waiting time.

The lower court held that the time between 5:00 P.M. and 8:00 A.M., except for the usual hours for eating and sleeping, was work time within the meaning of the FLSA. The Supreme Court affirmed, stating:

> "We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging on the employees' hands and because the employer and the employees cooperated in trying to make the confinement and idleness incident to it more tolerable." (Emphasis added.) 323 U.S. at 134.

In Skidmore, decided on the same day as Armour, the Supreme Court was faced with a similar situation. Here again the employees were employed as private fire fighters and "[u]nder their oral agreement of employment," (emphasis added) 323 U.S. at 135, had specific daytime hours during which they performed specific duties. They claimed that the time during which they were "employed" within the meaning of the FLSA also included the nights during which they were required to be on the employer's premises or within hailing distance subject to call, even though they were not required during this time to perform any specific task except answering alarms, which were very rare. The parties stipulated that the employees "agreed" to this arrangement. (Emphasis added.) 323 U.S. at 136.

Unlike the lower court in Armour, the district court made no findings of fact as

to whether the fire-hall duty constituted working time, and decided as a "conclusion of law" "the time spent in the fire-hall subject to call . . ." does not constitute hours worked. Ibid. The court of appeals affirmed.

For the reasons set forth in Armour, the Supreme Court reversed. Since the Supreme Court felt that the district court's factual inquiry was apparently restricted by its erroneous view of the law, it remanded the case for further proceedings consistent with its decision. Even though the Supreme Court remanded, it is submitted that it made abundantly clear what it expected the basic outcome to be. Its intent is evident in its comments that, while eating and sleeping activities would occupy the firemen's time anyway,

> "the rest of the time is different because there is nothing in the record to suggest, even though pleasurably spent, it was spent in the ways that the men

would have chosen had they been free to do so." (Emphasis added.) 323 U.S. at 134.

Thus, the Supreme Court seems to have been saying what is provided in the Administrator's interpretive bulletins, which are discussed below and set forth in the Appendix: if the employer substantially restricts its employees' freedom to do as they wish or leave the premises, then the time constitutes hours worked because they have been "employed to wait."

Therefore, the controlling decisions of this court, Armour and Skidmore, do not allow for an interpretation that an agreement between the employer and the employees can justify the employer's failure to compensate the employees for waiting time when the employees' freedom to leave or to do as they wish is substantially impaired.

This view was repeated and made more specific in Anderson v. Mt. Clemens

Pottery Co., 328 U.S. 680 (1946). While much of Mt. Clemens Pottery dealt with "preliminary" and "postliminary" activities prior to or subsequent to the work day, the court announced that the work week ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." 328 U.S. at 690-691. (Emphasis supplied.)[3] The decision below in favor of the employer on the waiting time issue was allowed to stand only because there was no evidence that the employer had required employees to wait.

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[3]The Portal to Portal Act, 29 U.S.C. 251-62, overruled Mt. Clemens in part concerning preliminary and postliminary activities, but did not change the rule concerning an employer engaging an employee to wait.

Also of significance is Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 741 (1981), and the numerous Supreme Court cases cited therein, and which contained the following quotation from Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602-603:

> "'The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts.... Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.'" (Emphasis added.)

Still further, if this court agrees with the lower court that there can be a valid agreement to waive rights which employees would otherwise have under the FLSA, then it must be possible to have valid employee waivers of other similar

rights. Are we to say, for example, that a woman gives up her equal pay rights under 29 U.S.C. 206(d), which is also part of the FLSA, by continuing to work for her employer who pays men more for identical work? Are we to say that an employee of a protected class validly agrees to waive his Title VII rights when he continues to work for a discriminating employer?

Surely the law cannot countenance an agreement by which employees waive FLSA rights which they otherwise would have, and petitioners urge that this court so hold.

Lower Court Decision Is Contrary to Administrator's Guidelines

In Skidmore this court acknowledged that the guidelines were "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," 323 U.S. at 134, and that "[g]ood

administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. 323 U.S. at 140. See also General Electric Co. v. Gilbert, 429 U.S. 125, 141-142 (1976); Meritor Savings Bank FSB v. Vinson, 54 U.S.L.W. 4703, 4706 (June, 1986).

The decision below is at complete variance with the Administrator's guidelines and is insupported by any reasons for such.

The Administrator's guidelines concerning waiting time are set forth in the appendix, and the more relevant provisions are marked with stars for the court's ready reference. Found throughout the guidelines is the requirement that employees be paid for waiting time unless they are free to leave the employer's

premises. While petitioners urge the court to read all of the guidelines, certain of them are of particular significance:

29 C.F.R. 785.15 gives examples of employees deemed to be on duty who must be compensated, even though they are not engaged in active physical labor. The resaon for such is that the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. Skidmore, as well as a number of other cases are cited in support.

29 C.F.R. 785.16 delineates when an employee is off duty such that his time is not compensable. It provides than an employee is not completely relieved from duty and cannot use the time effectively

for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived.

29 C.F.R. 785.17 once again directs that an employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working on call and must be compensated. The regulation cited Armour, supra, inter alia.

29 C.F.R. 785.22 relates to situations where the employer furnishes sleeping facilities and the employees are not able to use their waiting time effectively for their own purposes as in the Armour and Skidmore situations. In such situations the employer and the employee may agree to exclude from compensable time bona fide meal periods

and bona fide regular sleeping periods of up to eight hours, assuming the employee can usually enjoy an uninterrupted night's sleep. But the agreement, if there is one, can only exclude the bona fide meal and sleeping periods; the rest of the time is compensable.

If An Agreement Legitimates A No-Leave Policy, Does An Employee's Failure to Quit Constitute Such An Agreement?

As indicated above, petitioners take the view that the results in Armour and Skidmore, as well as the comments in Mt. Clemens Pottery, clearly show that an agreement to a no-leave policy is not a defense to a claim for compensation for waiting time when the employer requires that the employees remain on his premises. If the court should disagree with this view, however, then petitioners urge that, as a matter of law, an agreement cannot result from the mere fact that employees

do not quit their jobs when the offending practice is put into effect or comes into "focus."

The court of appeals cited Shepler v. Crucible Fuel Co., 140 F.2d 371, 374 (3rd Cir. 1949) for the proposition that continuance of employment can be evidence of an implied agreement to the terms of that employment. However, the rule which arose in the factual context of Shepler should not be applied here.

In Shepler, watchmen had been paid a certain monthly wage prior to the passage of the FLSA. After the enactment of the FLSA, the employer proposed to pay the watchmen an hourly wage, with overtime pay at the correct multiple, for overtime hours. The total amount of pay at the end of a month was equal to the pre-act monthly pay. Thus in Shepler the employees did not agree to a loss of income

or to any adverse change in working conditions.

The rule of Shepler simply ought not to be applied to the instant case, where the failure to quit is deemed to be an agreement to be confined to the employer's premises at the new dockside location and at the same time suffer a fifty percent reduction in wages.

Furthermore, this court has not allowed other compelling and coercive options to go unredressed in other cases which have come before it, and the present Hobson's choice should not be countenanced either.

Although Garrity v. State of New Jersey, 385 U.S. 493 (1967) was a criminal case, it involved an employment situation wherein the Court found that police officers were coerced into losing their means of a livelihood or either in-

criminating themselves. The Court struck down the coercive conduct therein.

More particularly, the facts in Garrity showed that police officers accused of fixing traffic tickets could refuse to answer questions at an investigatory hearing, in which an officer would thereupon be removed from office pursuant to a state statute for failure to testify. Or, the officer could testify, make incriminating statements against himself, and waive his constitutional rights against self-incrimination.

This court held there was no legal waiver of rights because of the coercive nature inherently within the option presented to the police officers.[4]

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[4]Other cases cited in Garrity show compelling economic coercion inherent in the options presented to certain employers. The Court would not allow the options to legally stand.

Just as there was no waiver in Garrity, there should be no waiver of the employees' rights to compensation here.

Does the Employer's Provision Of Limited Recreational Activities, Or The Possibility That the Unpaid Workplace Incarceration May Produce A Later Paying Job, Absolve the Employer Of The Obligation To Compensate For Such Waiting Time?

While the court of appeals' decision appears to have been bottomed upon the finding of an agreement, it also seemed to endorse the finding of the district court that, because of the limited recreational activities made available and because potentially the unpaid waiting time might help to produce a paying job, the waiting time was actually more for the benefit of the employees and less for the benefit of the employer. That finding appeared to mitigate in favor of a decision for the employer.

Petitioners submit, however, as indicated above, that the most meaningful criteria, if not the sole criteria, should be the degree to which an employee's freedom is impaired. Further, in evaluating the degree of impairment, whenever the employee is not allowed the leave the premises his freedom quite obviously is very substantially impaired. Therefore, the limited recreational activities which were provided by respondent should have no bearing upon the outcome of this case. After all, the employer chose these recreational activities. By the employer's decision to prohibit the employees from leaving the premises, the employer removed the employees' freedom to chose any other activities.

Also, it is very respectfully suggested that a moment's thought will reveal the invalidity of the lower court's view that the unpaid workplace incarcera-

tion was more to the benefit of the employees than to the employer because it might help produce jobs in which the employees could receive earnings.

In the first place, there was not a shred of evidence in the record to support such a view.

Second, under the lower court's view forced unpaid waiting time would never be for the benefit of an employer, because it could always be said that such waiting time would assist the employer and any assistance given to the employer might help produce more business, which in turn would produce more paying jobs. The lower court's logic simply eliminates from our consideration any benefit which can be given to an employer because in its view benefit to an employer is in reality benefit to the employees.

Third, such a view obviously conflicts with the intent of the FLSA, since

employees are to be paid whenever they are in the employ of their employer, irrespective of whether such work may produce additional work in the future.

Fourth, such unpaid waiting time obviously predominated to the benefit of the employer, as the employer was able to control the actions of its employees in accordance with its wishes without having to pay anything for it. If the waiting time truly was for the benefit of the employees, then there would be no need for the employer's requirement, enforced by threat of dismissal, that the employees not leave the premises.

CONCLUSION

It is clear that when the employer docked its derrick barges at its maintenance facility it was practical for it to allow the employees to leave the premises after they had worked their eight hour shift. The Supreme Court decisions in Armour, Skidmore, and Mt. Clemens Pottery, as well as the Administrator's regulations interpreting those cases, all require that an employee be relieved of duties and be allowed to leave the employer's premises so that he may spend the time away from the employer's facility as he so chooses. If the employer requires an employee to remain on the premises, then he has engaged the employee to wait even if there is no physical activities to be performed.

Further, an employer's directing its employees to remain on its premises but

not be compensated for idle waiting time cannot amount to a legally cognizable agreement to accept compensation for time actually engaged in physical labor just because the employee continues to work under such an arrangement.

Petitioners respectfully request that the decision of the United States Court of Appeals for the Fifth Circuit be reversed, and that this case be remanded to the United States District Court for the Western District of Louisiana for a trial to determine the amount of their monetary damages.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

C. M. ROUSSEAU, JR., ET AL,
Petitioners,

V.

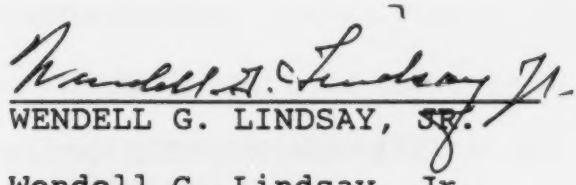
TELEDYNE MOVIBLE OFFSHORE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Wendell G. Lindsay, Jr., a member of the bar of this Court, hereby certify that on this 15th day of June, 1987, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above

entitled case were mailed, first class, postage prepaid, to Mr. Greg Guidry, Post Office Box 3507, Lafayette, Louisiana 70502, counsel for the respondent, Teledyne Movible Offshore, Inc. I further certify that all parties required to be served have been served.



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